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Nos. 14-556, 14-562, 14-571, and 14-574

# In the Supreme Court of the United States

JAMES OBERGEFELL, ET AL., PETITIONERS
*v.*
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL., RESPONDENTS

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF RESPONDENTS

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(Additional captions listed on inside cover)

VALERIA TANCO, ET AL., PETITIONERS

*v.*

BILL HASLAM, GOVERNOR OF TENNESSEE, ET AL., RESPONDENTS

APRIL DEBOER, ET AL., PETITIONERS

*v.*

RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL., RESPONDENTS

GREGORY BOURKE, ET AL., PETITIONERS

*v.*

STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL., RESPONDENTS

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## *AMICUS CURIAE* STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] is respectfully filing this Brief in Support of Respondents, supplementing his pre-certiorari brief in Case 14-571 ("*DeBoer*").[2]

The present brief presents a "worst-case litigation scenario" for Respondents, wherein Petitioners may indeed suffer constitutional injury from same-sex-marriage bans. However, the scenario is even worse than that, since this brief assumes that no matter how the Court decides, either Petitioners *or Respondents* might suffer constitutional injury. And that injury is easier for Petitioners to avoid.

That, plus other reasons, should persuade this Court to hold for Respondents and their citizens' democratic vote to retain traditional marriage alone.

## SUMMARY OF ARGUMENT

Though most same-sex couples lack children, those who have them, *de facto* deprive those children of either mother or father—and if the State promotes same-sex marriage, that state action may violate children's rights to mother and father. Even if same-sex-marriage bans do constitutional injury to same-sex couples and their children, then, under *Grutter v. Bollinger* (539 U.S. 306 (2003)), a State may risk constitutional injury (such as using blatant racial

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[1] No party or its counsel wrote or helped write this brief, or gave money intended to fund its writing or submission, *see* S. Ct. R. 37. Blanket permission from Respondents to write briefs is filed with the Court, as is a letter of permission to Amicus from Petitioners.

[2] *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted* (U.S. Nov. 18, 2014) (No. 14-571).

preferences) to parties if there is sufficiently-compelling justification. And the likely constitutional injury from State endorsement/assistance to depriving a child of mother or father, plus other injury, strongly justifies a State's not licensing same-sex marriages.

*Ballard v. United States*, 329 U.S. 187 (1946), and *Tigner v. Texas*, 310 U.S. 141 (1940), support the idea that with the physical differences between same-sex couples and opposite-sex couples re fertility, etc., same-sex-marriage bans make sense.

Same-sex-marriage bans steer bisexual or sexually-fluid persons towards heterosexual marriage. This increases the number of children, and reduces the amount of sodomy-norming role-modeling for children.

Same-sex-marriage bans are not "underinclusive" re fertility, due to, e.g., privacy concerns which preclude fertility testing.

The *Grutter* compelling state interest in diversity also applies to gender-diverse couples who raise children. Moreover, the State may show respect for life—which only diverse-gender couples can create—by its regulations, much as with abortion laws.

A State's People are competent to assess the cost and benefit of various marriage laws.

A sex-discrimination claim is not appropriate, especially since same-sex marriage creates sex-segregation.

A sexual-orientation-discrimination claim is not appropriate, even if such claims are appropriate for employment, housing, or other matters.

Sodomy is far more dangerous than heterosexual sex, and the tendency of same-sex-parenting to

increase children's likelihood of homosexual behavior may adversely affect fertility and disease rates.

Arguments for mandatory legal same-sex marriage are hard to distinguish from those for legalized polygamy.

Social science about same-sex marriage and its effects is still in flux, though some research strongly supports Respondents.

Compelling state interests, narrowly tailored and with least-restrictive means, support Respondents' marriage laws.

While Respondents deserve victory, there are possibilities for a "middle ground" if desired.

The Court's decision will inevitably disappoint Petitioners or Respondents; but the tragedy of ending democratic rule in America can be avoided by holding for Respondents.

## ARGUMENT

## I. SAME-SEX COUPLES MAY MOVE TO A STATE WITH SAME-SEX MARRIAGE; THEIR CHILDREN CANNOT EASILY LEAVE THEIR PARENTS AND GET DIVERSE-SEX PARENTS

### A. Most Homosexual Couples Do Not Have a Household with Children

As a starting note, Amicus observes that "same-sex-marriage bans hurt the children" may be a red herring, in that over 80% of gay couples don't even have children in the household.[3] The vast majority

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[3] *See* Gary J. Gates, *LGBT Parenting in the United States*, The Williams Inst., Feb. 2013, http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf, at 2.

being childless, one need do little more than mention "The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both", *Ballard*, 329 U.S. at 193 (Douglas, J.), and "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same", *Tigner*, 310 U.S. at 147 (Frankfurter, J.), to disprove a "constitutional right to same-sex marriage"

### B. How Same-Sex Marriage Injures Children: Deprivation of Mother or Father, and the Consequences

But where there are children, one should not injure them through state action. However, Amicus does not see how bans on same-sex marriage hurt the children of same-sex couples more than bans on polygamy hurt the children of polygamists: bans on polygamy being perfectly constitutional so far. (In fact, polygamists would tend to have *more children* to be hurt. Are polygamists' kids second-class citizens, or "children of a lesser god", compared to homosexuals' kids?)

However, Amicus shall assume, *only* for the sake of argument, that same-sex-marriage bans may wield some constitutional injury against same-sex couples' children.

This might seem to give an "automatic win" to Petitioners' side, or close. However, are children also hurt if same-sex-marriage bans are struck down?

As evinced by testimony in the amicae/i briefs in these cases from Barwick & Faust, Lopez & Klein,

and Stefanowicz & Shick (Amicus was counsel), *see* Brs. *passim*, and other evidence, children do suffer in same-sex marriages, horribly, by having no mother or no father—with the attendant stigma, humiliation, injury, and gender confusion—, and growing up in an environment that encourages comparatively-dangerous sex (sodomy). Because of the State's actions in encouraging, through government honor and subsidy, same-sex couples to marry, with full knowledge that many of them will have children, through surrogacy or otherwise, the State is responsible for what happens. This State action hurts children, including the expressive harm of saying those children do not need both mother and father; and this gives ample reason for States not to license same-sex marriage.

Otherwise put: if children should have an equal right not to be deprived of a mother or father, then State licensing of same-sex marriages may violate the Fourteenth Amendment equal-protection rights of same-sex couples' children.

So if either same-sex marriage, or same-sex-marriage bans, may hurt children, then who decides on the legality of same-sex marriage? If there is damage (or benefit) either way, it seems States should be trusted to do a "cost-benefit judgment" and make the decision.

This is all the truer since there is no *nationwide* same-sex-marriage ban. Many States offer such marriages, so, if first cousins must move to another State to marry, how is it unconstitutional for same-sex couples to do similarly?

By massive contrast, same-sex couples' children who do not enjoy being deprived of a mother or

father cannot just easily "divorce their parents" and go to the corner store and get themselves a new, diverse-gender set of parents like the vast majority of children have. The children are basically trapped until age 18 in that sad situation—and, horribly, may not even be aware of their deprivation, *see, e.g.*, Barwick/Faust Br. at 7-8, 11 (detailing how *amicae* did not realize their loss until later in life). And even after 18, they may live the rest of their lives sans a mother or father, unless they somehow get adopted by someone else.

Agency, autonomy, right of exit, "choice": whatever one calls it, same-sex couples' children are deprived of it, re motherlessness or fatherlessness. And those helpless children should be protected from that, by letting States avoid licensing same-sex marriage.

(Same-sex-marriage supporters who really care about children, should insist that *all children*, even of the unmarried or polygamists, receive equal benefits, without their parents having to be legally married. After all, *Plyler v. Doe* (457 U.S. 202 (1982)), *see id.*, did not give "illegal/undocumented" children, or their likely also "illegal/undocumented" parents, legal-citizenship status, though both parents and children may feel "stigmatized" by lack of legal-citizen status.)

### C. *Grutter* Allows States to Balance "Constitutional Injury" with Countervailing, Beneficial State Interests

So there is a terrible differential, i.e., that same-sex couples can move and escape any "injury", but

children cannot easily "dump" their same-sex parents. Thus, same-sex marriage can be considered more damaging than same-sex-marriage bans—or at least States may so find, just as they may support injurious race preferences, *see Grutter*, *supra* at 2, *passim*.

In fact, under *Grutter*, States are allowed to *choose* a constitutionally-injurious practice, when they could choose instead a practice that *does no constitutional injury*:

> [W]henever the government treats any person unequally because of his or her race, that person has suffered an injury[.]

*Id.* at 327 (internal quotation marks omitted) (O'Connor, J.). E.g., States may choose to allow affirmative action, with open race (or gender) preferences that may stigmatize both the recipients—possibly seen as unable to win college admission without race/gender bonuses—and the majority, e.g., white males, who may feel stamped as "unworthy" of race/gender preferences; when the States could simply have chosen *not to have* affirmative action, *see, e.g.*, *Schuette v. BAMN*, 134 S. Ct. 1623 (2014), and there would be no stigmatization or constitutional injury.

By contrast, in the instant cases, either way may risk constitutional injury, whether upholding or overturning same-sex-marriage bans; and, again, same-sex couples may escape injury by merely crossing a State border, whereas their children might have to fly to Neverland to find a mother or father. (Borrowing from tort law: the "cheapest cost

avoider" or "easiest risk-avoider" is the same-sex couple, not their children, so the adults should have to make the accommodation.) *A fortiori*, then, it is even more constitutionally allowable to uphold same-sex-marriage bans than it is to uphold affirmative action.

(In addition, even if quasi-suspect classification were necessary in these cases, due to gender or sexual-orientation "discrimination"; such "discrimination" is less serious than racial discrimination—as in race-based affirmative action—, which is fully-suspect classification.)

While there may be no black-letter "constitutional right to *a* mother and father" in the Nation at present, nor is there a black-letter "constitutional right to a State same-sex marriage", either. So for this Court to invent a constitutional right to State same-sex marriage but not acknowledge a constitutional right to a mother and father—and there is a far older tradition of having and cherishing father and mother than of same-sex marriage, *see, e.g.*, the Fifth Commandment (*Exodus* 20:12), ordaining honor to father and mother so that the children may live long—, risks seeming biased and irrational by the Court.

After all, Justice Sandra Day O'Connor's concurrence in *Lawrence v. Texas*, 539 U.S. 558 (2003), notes, "[R]easons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." *Id.* at 585. Protecting children's right to a mother and father, and to an environment not role-modeling sodomy, are indeed "legitimate reasons", *id.*

## II. *BALLARD* AND *TIGNER* RE SAME-SEX COUPLES' PHYSICAL IMPOSSIBILITIES: HAVING CHILDREN TOGETHER; HAVING REPRODUCTIVE SEX; AND PROVIDING DIVERSE-GENDER PARENTAGE

Indeed, for same-sex couples, some things are physically impossible. —First, they cannot get each other pregnant. Second, the only kinds of sexual relations they can have are non-reproductive, a.k.a. "sodomy". And third, they can never provide gender-diverse parenting or role-modeling. Two men cannot breast-feed a child; two women cannot provide a little boy a male role model.

Once again, *Ballard* and *Tigner*, *supra* at 2, hold sway, letting the law treat unlike parties—same-sex and diverse-sex couples—differently. Amicus politely notes that Petitioners' briefs never mentioned *Ballard* at any point, when Petitioners may have duty to mention such directly contrary authority to the Court.

There are profound common-sense differences between diverse-gender and same-gender couples. If this Court wants to openly overrule *Ballard*, that seems a radical and destructive step to take.

We now focus on how same-sex-marriage bans are effective at their goals:

## III. BISEXUAL AND SEXUALLY-FLUID PERSONS WILL OFTEN CHOOSE OPPOSITE-SEX SPOUSES WHEN SAME-SEX MARRIAGE IS UNAVAILABLE; THUS, SAME-SEX-MARRIAGE BANS ARE HIGHLY RATIONAL

## A. Human Sexual Fluidity Comprises Many Bisexual or Other Americans Who Could Choose either Sex-Segregated or Diverse-Gender Marriage

Same-sex-marriage proponents often cite only two groups as really relevant: heterosexuals and homosexuals. Supposedly, a same-sex-marriage ban—since it neither affect heterosexuals nor makes homosexuals enter heterosexual marriages—is not only meaningless but mean: an illegal instantiation of "animus"

However, that binary model *supra* is false. There is a "rainbow" of sexual preference: traditional two-person heterosexual relationships; polygamy; homosexuality; asexuality; and bisexuality, among others. The last of those, bisexuality, has many adherents in America.

The Wikipedia article *Bisexuality*[4] offers figures ranging from 0.7 to 5 percent of Americans being bisexual, *see id.* There may be even more bisexuals than homosexuals: "*The Janus Report on Sexual Behavior*, published in 1993, showed that 5 percent of men and 3 percent of women considered themselves bisexual and 4 percent of men and 2 percent of women considered themselves homosexual." *Id.* (footnote omitted) Thus, with so many people attracted to either sex, the myth of "immutable sexual preference" vanishes.

The number may be even larger than 5%: "Alfred Kinsey's 1948 work *Sexual Behavior in the Human*

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[4] http://en.wikipedia.org/wiki/Bisexuality (as of Mar. 29, 2015, at 5:53 GMT).

*Male* found that '46% of the male population had engaged in both heterosexual and homosexual activities[.]" *Id.* (footnote omitted)

*See also, e.g.*, "A 2002 survey in the United States by National Center for Health Statistics found that [:] 2.8 percent of women ages 18–44 considered themselves bisexual, 1.3 percent homosexual, and 3.8 percent as 'something else'", *id.* (footnote omitted); therefore, 6.6 percent who were either bisexual or "sexually flexible"

So, if we conservatively assume that not even 5%, but only 4%, of the population is bisexual/"sexually fluid"; then if there are c. 320 million Americans right now, c. 12.8 million are bisexual. If even half of those marry, that is 6.4 million people, with roughly 3.2 million marrying opposite-sex partners, and 3.2 million marrying same-sex partners, if same-sex marriage were available.

But if same-sex marriage were unavailable, then, at least c. 3.2 million more people, if they marry, would marry opposite-sex partners. Over three million people moved into diverse-gender marriage provides far more than a mere "rational basis" for same-sex-marriage bans, but rather, an extremely compelling state interest.

If the real-life numbers are anywhere close to those hypothetical figures—or even if lower—, they make the case for a direct, very strong nexus between same-sex-marriage bans and the channeling of people into heterosexual marriages.

### B. A Revelatory Law-Review Article Admitting Same-Sex-Marriage Bans' Channeling Effect Towards Diverse-Gender Marriages

Even some proponents of same-sex marriage admit, and lament, that laws like Respondents' "channel" bisexuals into heterosexual marriages. *See* Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 San Diego L. Rev. 415 (2012): "This Article proposes that same-sex marriage bans channel individuals, particularly bisexuals, into heterosexual relations and relationships[.]" *Id.* at 416. Boucai believes (wrongly) that same-sex-marriage bans violate fundamental rights, *see id. passim*. So he is basically "admitting against interest" when acknowledging the channeling effect.

Some mechanisms for such channeling include "proscription of competing institutions[,] vast material support, and symbolic valorization", *id.* at 418 (footnote omitted). (Polygamy is another "proscribed competing institution", so same-sex marriage is not alone.)

Also: bisexuals are a "class of individuals, amorphous yet numerous", *id.* at 438; "72.8% of all homosexually active men identify as heterosexual", *id.* at 440; certain "trends describe only self-identified bisexuals. It would be startling if bisexuals' true rates of heterosexual coupling and marriage were not significantly higher", *id.* at 450; bisexuals are "by some estimates an 'invisible majority' of LGBT people", *id.* at 483-84 (footnote omitted); and, "With regard to procreation, this Article's argument implicitly concedes one way in which same-sex marriage bans advance the state's interest: by increasing the number of bisexuals who pursue same-sex relationships, legalization

presumably will decrease these individuals' chances of reproducing." *Id.* at 482.

Boucai's last observation *supra* disproves the argument, "Same-sex-marriage bans just hurt same-sex couples and their kids who are already together." That argument falsely assumes that legalized same-sex marriage will entice *nobody* into entering same-sex relationships: a startling assumption. Same-sex-marriage supporters are adamant that legalized same-sex marriage has wonderful benefits; if that is true, why would it not greatly entice people (e.g., bisexuals) to enter same-sex relationships, who otherwise would not have entered them?

And Boucai also shows far more extreme views. For example: "[What if the] impressionable psychosexual development of children is a basis for widening, not limiting, the range of 'lifestyle choices' to which they are exposed[?]", with a citation "urging advocates to affirm that nonheterosexual parents 'create an environment in which it is safer for children to openly express their own sexual orientations'". *Id.* at 484 & n.456. I.e., Boucai posits nonheterosexual parenting as *better than* heterosexual parenting, *see id.*, because a larger amount of children's homosexual behavior will occur. If Boucai admits it, who is anyone else to deny it?

BiLaw's brief in these cases, *see id.* at 7, rightly mentions Boucai and his complaint that same-sex-marriage litigation has unjustly omitted bisexuality issues. However, that brief itself, *see id.*, unfortunately omits Boucai's fertility-based rationale for how same-sex-marriage bans have a rational—or compelling—basis, and omits Boucai's candid

admission about how gay parenting makes children's homosexual behavior more likely.

The LGBT community even privately acknowledges sexual flexibility, using terms like "yestergay", *see* Wiktionary, *yestergay*,[5] "1. (slang, LGBT) A former gay male who is now in a heterosexual relationship", *id.*, or the terms "hasbian" and "lesbians until graduation". Our courts should publicly acknowledge this "sexual flexibility", and should acknowledge Boucai's admissions *supra*, which support Respondents' case.

### C. The Successful Heterosexual Marriages of Some Sexually-Fluid People: Further Proof that Same-Sex-Marriage Bans Are Effective

Theory aside, there are multifarious real-life examples of how channeling people into diverse-gender marriages works. *See, e.g.*, Carrie A. Moore, *Gay LDS men detail challenges: 3 who are married give some insights to therapist group*, Deseret News, Mar. 30, 2007, 12:22 a.m.,[6]

> Speaking to a standing-room-only audience, three LDS couples described their experiences with their heterosexual marriages, despite the fact that each of the husbands experience[s] what they call same-sex attraction, or SSA. .

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[5] http://en.wiktionary.org/wiki/yestergay (as of May 22, 2014, at 23:54 GMT).

[6] http://www.deseretnews.com/article/660207378/Gay-LDS-men-detail-challenges.html.

> . .
>
> Because of the nature of the discussion, none of the participants wanted their [sic] identities publicized.
>
> . .
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> . .
>
> "[M]arriage and family . . . . was always the goal, even when I [one husband] was in the wilderness."
>
> . . .
>
> The wives said they see their husbands as much more than their same-sex attraction. Despite the challenges and public perception to the contrary, one said, "there are people who are married and dealing with this."

*Id.* This revelatory story of courage and persistence teaches us much. It shows, *see id.*, that sexually-fluid people can be channeled into successful diverse-gender relationships. It also shows, *see id.*, the fear and anonymity that such people go through, perhaps obscuring their true, massive numbers.

*See also, e.g.*, Variety Staff, *TLC Faces Pressure to Cancel 'My Husband's Not Gay' Special, GLAAD Calls Show 'Dangerous'*, Variety, Jan. 6, 2015, 7:02 a.m.[7] (homosexuals try to censor idea that sexually-flexible people might choose heterosexual lifestyle).

### D. The Defeat of Arguments for the Ineffectiveness of Same-Sex-Marriage Bans, by the Proof Above

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[7] http://variety.com/2015/tv/news/tlc-my-husbands-not-gay-cancellation-protest-glaad-1201393586/.

At this point, lower courts' arguments that same-sex-marriage bans do not channel people, and procreative power, into traditional marriages, is destroyed. If same-sex couples are not allowed State-licensed marriage, then huge numbers of people, e.g., the sexually-fluid men noted *supra*, will be, and have been, incentivized to enter gender-diverse marriages. (Even those already in gay relationships may change course. For example, Ellen DeGeneres' lesbian lover Anne Heche later married a man, Coleman Laffoon, and then moved on to James Tupper, having a son by each, *see, e.g.*, Wikipedia, *Anne Heche*.[8] *See also* Gary DeMar, *How Can Chirlane McCray de Blasio be a 'Former' Lesbian?*, Godfather Politics, Dec. 28, 2013[9] (noting that New York's mayor's wife is former lesbian, despite stereotype that gays are immutably "born that way").)

So, same-sex-marriage prohibitions are effective—or same-sex-marriage supporters like Boucai would not admit it.

## IV. THE FAILURE OF "UNDERINCLUSIVENESS RE FERTILITY" ARGUMENTS AGAINST SAME-SEX-MARRIAGE BANS

And the prohibitions are quite constitutional, despite weakly-reasoned counterarguments like "underinclusiveness re fertility". Infertility is very difficult to police, especially when advancing medical technology may cure infertility previously thought

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[8] http://en.wikipedia.org/wiki/Anne_Heche (as of Apr. 2, 2015, at 00:23 GMT).

[9] http://godfatherpolitics.com/13765/can-chirlane-mccray-de-blasio-former-lesbian/#.

incurable. (Some people sterilize themselves; but they may have new surgery and become fertile again. Should a "Fertility Police" give everyone frequent examinations before and during marriage?)

Too, as for elderly/post-menopausal people, what age is that, precisely? Again, medicine may assist fertility at later ages than previously possible. As well, men are often fertile longer than women, so that any "Senior-Citizen Fertility Police" would run into equal-protection problems, in that old men might be allowed to marry, while old women might not be: an outrage.

As for individuals who "choose not to procreate": millennia of ribald literature, plus common sense, confirm that even sincere desire to remain celibate—or consistently use birth control—, between two romantic partners, may last as long as a dandelion blown to pieces by a warm summer wind. Also, will a "Birth Police" make sure there is issue, progeny, born from a marriage?

By contrast, gender is supremely easy to understand and police. So, "underinclusion" re fertility fails as an objection.

## V. *GRUTTER* AND CHILDREN'S BENEFIT FROM DIVERSE-GENDER PARENTAGE; AND THE BAN'S SOCIALLY-BENEFICIAL, LIFE-AFFIRMING EXPRESSIVE CONTENT RE *CASEY* AND *CARHART*

### A. Gender-Diverse Parentage Is a Compelling State Interest

There is another socially positive aspect to same-sex-marriage bans besides increased fertility. That

is, *Grutter* upholds diversity, including gender diversity, as a compelling state interest, *see* 539 U.S. at 325. (Too, the Sixth Circuit iteration of *Grutter*, 288 F.3d 732 (2002), cites with favor the use of gender preferences, *see id.* at 745.) Since it would be ludicrous to say diversity is compelling in formal education but cannot even be *rationally* relevant in 18 years of child-nurture, then a gender-diverse parentage is worthy of special favor by the State. (*See, e.g.*, HHS, *Promoting Responsible Fatherhood—Promoting Responsible Fatherhood Home Page* (last revised July 21, 2011),[10] "Involved fathers provide practical support in raising children *and serve as models for their development*." *Id.* (emphasis added))

Some may make questionable counterarguments, e.g., "Then why couldn't a State make forced interracial marriage a compelling state interest?" But that would be unadministrable; there are so many racial/interracial categories, that it would be impossible to assign people. By contrast, there are only two sexes; and dual-gender marriage has been the standard arrangement worldwide for thousands of years.

And, some critics say same-sex-marriage bans presume same-sex couples can never be good parents. However, Respondents may only presume that diverse-sex couples have something special to offer in parenting. The two *Grutter* cases *supra* show how gender diversity matters; and part of the rationale States may adopt per *Grutter*, 539 U.S. 306, is, *see id. passim*,

1) a bonus for diversity

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[10] http://www.fatherhood.hhs.gov/.

2) that allows exclusion of others.

Thus, diversity bonuses in university admissions to members of some groups, may exclude certain others (e.g., white males). But this of course does not mean white males cannot be good students; similarly, even though same-sex-marriage bans exclude same-sex persons, such bans do not mean same-sex couples can't be good parents.

Also, no "sex stereotyping" is going on here: in fact, if children have "nontraditional-occupation" male and female parents, e.g., a homemaker father and a Marine Corps sniper mother, that may help *break down* gender stereotypes. *See, e.g.*, Sonia Sotomayor, My Beloved World (paperback ed., Vintage Books 2014 (2013)), mentioning that her father cooked the dinners, *id.* at 16, and that, "In many ways, he defied the macho stereotype of a Latin male." *Id.* at 78. Same-sex-marriage prohibitions stereotype no one. (Unless observing that women can breast-feed and men can't, is "stereotyping".)

### B. A Lower Court's Failure to Respect Gender Diversity in *DeBoer* Repeats That Court's Failure to Respect Racial/Gender Diversity in *Grutter*

Mistakes are best not repeated, including ones made by the same court twice. The district court in *Grutter*, with the same judge who rendered one district-court opinion in the instant cases, Bernard Friedman, outlawed affirmative action (re Michigan Law School's admissions program), thus disrespecting the compelling power of diversity to

fulfill State interests, *see* 137 F. Supp. 2d 821, 849 (2001). This Court rightfully overturned that decision. And this Court, accordingly, should differ with the trial-court *DeBoer* decision, which does not appreciate the State's compelling interest in supporting diverse-gender couples, instead of same-gender couples, in publicly-recognized and subsidized marriage.

### C. Showing State Respect for Life

In addition, the State may uphold the value of life: and same-sex parents cannot have children with each other. (Artificial insemination and such may let same-sex couples have someone else's child—at least, half someone else's—and employ the social fiction of calling it their own.)

*See, e.g., Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992): "Regulations . . by which the State . . . . may express profound respect for the life of the unborn are permitted", *id.* at 877 (Kennedy, O'Connor, Souter, JJ.); *Gonzales v. Carhart*, 550 U.S. 124 (2007): "The [Partial-Birth Abortion Ban] Act expresses respect for the dignity of human life. . The government may use its voice and its regulatory authority to show its profound respect for the life within the woman", *id.* at 157 (Kennedy, J.). The instant cases are not about abortion, but they do involve procreation and human life. So, a State may "show its profound respect for . . life", *id.*, by passing laws honoring only those marriages, dual-gender ones, that create life.

Critics may rejoin that *Casey* and *Carhart*, *supra*, still permit some abortions, while a ban prohibits all same-sex marriages. However, this analogy is not

apt. Gays are still permitted to live their private sexual and relational lives any way they want, following *Lawrence*. They are just not automatically given a State blessing and funding for doing so.

This is similar to how abortion is treated: Americans are usually allowed to perform that physical act, but sans government endorsement, *see Casey* and *Carhart* (allowing government to undertake actions or messages favoring children's lives), and without government money, *see, e.g.*, the Hyde Amendment[11] (massively limiting federal abortion funding).

Thus, same-sex-marriage bans, including their expressive elements, constitutionally promote new life, gender equity and desegregation, and diversity.

## VI. STATES MAY WEIGH THE BALANCE OF COST/BENEFIT FROM SAME-SEX MARRIAGE

Some say that due to same-sex-marriage bans, same-sex couples' children are needlessly deprived of protection. However, polygamous families, too, produce children outside a legal marriage relationship; yet polygamy bans are legal, and those children are "deprived", despite States' *overall* desire to promote children being born into marriage.

The People, not courts, should decide between the contending social-science evidence, and also consider common-sense wisdom about gender-diversity, encapsulated in sources like *Grutter*. *See, e.g.*, *Carhart*, *supra* at 20 (disregarding medical

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[11] Pub. L. 94-439, tit. II, § 209, 90 Stat. 1434 (1976; amended 2009).

professionals' opinions and upholding federal partial-birth-abortion ban).

If same-sex couples' children allegedly suffer financial harm: since *United States v. Windsor*, 133 S. Ct. 2675 (2013), federal activism in extending tax breaks and other benefits to same-sex couples from any State has strongly alleviated any such harm,

And speaking of fiscal harm: if something honored as "marriage" can never naturally produce posterity, that "marriage" may spend public social capital and money on a non-productive relationship that the People consider wasteful. How could it be irrational for a poor, minority, heterosexual mother of five to decide that draining the public fisc to give same-sex couples (many of whom may be white and wealthy) an additional tax break is not right?

As for "humiliation of children": if any, it is probably no worse than polyamorists' children suffer. *See, e.g.*, Arin Greenwood, *Who Are 'The Polyamorists Next Door'? Q&A With Author Elisabeth Sheff* ("Sheff Article"), Huffington Post, updated Mar. 5, 2014, 10:59 a.m.,[12] "[K]ids in poly families [must] deal[ ] with stigma from society", *id.* Yet few people cry that polygamy must be legalized just because of "stigma". As well: what about children who feel stigmatized or horrified *by being children of a same-sex relationship*; who despise that sex-segregated upbringing? Those children may fear physical or emotional abuse if they speak out.

Moreover, in America, as of 2010, "[T]here are approximately 125,000 same-sex couples raising

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[12] http://www.huffingtonpost.com/2014/03/05/elisabeth-sheff-polyamory_n_ 4898961.html.

nearly 220,000 children."[13] 220,000 may be far less than the number of *new* children born of the possibly 3.2 million people moved into fruitful marriage by same-sex-marriage bans, *see supra* at 11. If those 3.2 million had roughly one child each, that would be over three million children, far more than the 220,000 children raised by same-sex couples. (Of course, the 3-million-some new children would be spread out over some years.)

Thus, if same-sex marriage is unavailable, so that same-sex couples lack State financial or status benefits, many sexually-fluid people will likely move into heterosexual marriages, which offer benefits, instead. Not only will this let some children who dislike a nontraditional upbringing, have a traditional two-gender upbringing instead: it will let more children be born, period, as noted *supra* at 12-13 (Boucai on same-sex-marriage bans' raising the fertility rate). Not a court, but the People, should weigh the comparative cost of not letting same-sex couples and their children receive certain financial or societal entitlements, with the benefit of having many more children born at all, and many moved under a diverse-gender parentage.

## VII. A SEX-DISCRIMINATION CLAIM IS NOT VIABLE

Speaking of gender: a sex-discrimination claim is invalid. —If Amicus said there are public facilities that utterly exclude women: this would sound horrible, except when Amicus explains that the

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[13] Gates, *LGBT Parenting*, *supra* n.3, at 3.

"facilities" are men's bathrooms. Context is key here, as with same-sex marriage. (Incidentally, re out-of-context assertions: various commentators claim gays and lesbians are as able as heterosexuals to form lasting relationships. But any number of people can form committed, long-term relationships, whether polygamists, underage couples, adult incestuous couples, etc.)

*Inter alia*, how is it "sex discrimination" to *prohibit* licensing sex-segregated environments for children? To claim otherwise turns the idea of sex discrimination on its head. One is tempted to say that instead, any unhappy *children* of a same-sex couple might have sex-discrimination or sex-segregation claims. *See, e.g.*, *Brown v. Bd. of Educ.* (347 U.S. 483 (1954)) (condemning segregated learning environments for children).

Some who support same-sex marriage, self-contradictingly also oppose same-sex classrooms, *see, e.g.*, Kelly Faircloth, *The ACLU Kicks Up a Fuss About Sex-Segregated Middle School Classes*, Jezebel, Jan. 24, 2014, 3:15 p.m.[14] (re lawsuit about sex-segregated classrooms). But if sex-segregated student bodies are damaging, why would sex-segregated parentage—and parents are around kids far more hours than kids' hours in school—not be even more damaging? States should have leeway not to license sex-segregated parentage for children.

In one State, Michigan, within two years, Michiganders passed Proposal 04-2, in 2004 (banning same-sex marriage), and also passed

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[14] http://jezebel.com/the-aclu-kicks-up-a-fuss-about-sex-segregated-middle-sc-1506578292.

Proposal 06-2, in 2006 (preventing race or gender preferences in public education—e.g., affirmative action—, employment, or contracting). Michiganders apparently believed that gender preferences in certain areas (should one's gender really be a plus in getting a contract?) was discriminatory. So, it is hard to say they were trying to promote sex discrimination by voting for Proposal 04-2, since they shortly banned it in Proposal 06-2.

Perhaps the People, with their common sense that is often wiser than the ideas of some academics or activists, realized that in a marriage setting, gender-diversity is not discriminatory: it may even be mandatory for optimal upbringing of children.

## VIII. A SEXUAL-ORIENTATION-DISCRIMINATION CLAIM IS NOT VIABLE; AND, UPHOLDING SAME-SEX-MARRIAGE BANS WOULD NOT SUPPORT EMPLOYMENT/ HOUSING DISCRIMINATION AGAINST GAYS

And upholding Respondents' marriage laws would not estop this Court from finding that gays suffer illegal discrimination in employment or other fields unrelated to marriage. For example, since gay people person can presumably flip hamburgers as well as heterosexuals can, it might be considered irrational for restaurateurs to fire burger-flippers for being gay. But same-sex marriage is distinguishable from business-related laws or private decisions.

After all, gay athletes Michael Sam and Jason Collins of the NFL and NBA might be superb at their sports, but that does not mean they can get pregnant, breast-feed, or serve as female role models.

The Court could someday, if desired, adopt heightened scrutiny re homosexuality *vis-à-vis* employment or other non-marital issues. (Amicus is not recommending heightened scrutiny, only saying that rational-basis scrutiny re same-sex marriage does not rule out higher scrutiny elsewhere.) This kind of bifurcated scrutiny has been done before, *see, e.g.*, *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982) (applying strict scrutiny to alienage, but a lower level of scrutiny re political classifications).

Indeed, it would be strange for the Court to declare mandatory national legalized same-sex marriage, when mandatory national employment/housing sexual-orientation-nondiscrimination measures do not exist yet. "Cart before the horse."

*See also, e.g.*, Dan Chmielewski, *Ronald Reagan on Gay Rights*, Liberal OC, June 9, 2008,[15] on the Briggs Initiative, a 1978 California ballot measure banning gay teachers from public schools,

> Reagan met with initiative opponents[,] and, ultimately, at the risk of offending his anti-gay supporters in the coming presidential election, wrote in his newspaper column: "I don't approve of teaching a so-called gay life style in our schools, but there is already adequate legal machinery to deal with such problems if and when they arise."

*Id.* However, Reagan was only protecting some employment for gays, and said explicitly, "I don't

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[15] http://www.theliberaloc.com/2008/06/09/ronald-reagan-on-gay-rights/.

approve of teaching a so-called gay life style[.]" *Id.* And government giving same-sex unions the honor of marriage, teaches children and others that the sexual lifestyle in same-sex marriage is just as healthy as a heterosexual lifestyle. *See Olmstead v. United States*, 277 U.S. 438, 485 (1928): "Our government is the potent, the omnipresent teacher." (Brandeis, J., dissenting from the judgment)

## IX. SODOMY AS CANCER, AIDS, AND INJURY VECTOR; AND SODOMY-NORMING AND -EXAMPLING FOR CHILDREN OF SAME-SEX MARRIAGES

On the note of "healthiness", *supra*: another reason to disallow same-sex marriage is that subsidizing relations based on sodomy may increase their number, although they are a risk factor for disease, injury, or death. E.g.,

> Anal sex is considered a high-risk sexual practice because of the vulnerability of the anus and rectum[, which] can easily tear and permit disease transmission[, resulting in] the risk of HIV transmission being higher for anal intercourse than for vaginal intercourse[.]

Wikipedia, *Anal sex*[16] (citations, including internal, omitted).

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[16] http://en.wikipedia.org/wiki/Anal_sex (as of Mar. 19, 2015, at 16:17 GMT).

There are other deadly problems with sodomy besides HIV/AIDS, such as cancer. *See, e.g.*, Matt Sloane, *Fewer teens having oral sex*, The Chart, CNN, Aug. 17, 2012, 10:41 a.m.,[17] "'It's widely accepted that there is an increased number of head and neck cancers today due to changes in sexual practices . . specifically, an increase in oral sex, said Dr. Otis Brawley, the chief medical officer of the American Cancer Society." *Id.*

*See also* Gay Men's Health Crisis, *The Bottom Line on Rectal Microbicide Research* (undated, but about a Jan. 23, 2013 presentation),[18] "Unprotected anal intercourse is 10 to 20 times more likely to result in HIV infection compared to unprotected vaginal intercourse[, and] is a significant driver in the global HIV epidemic among gay men and transgender women[.]" *Id.*

Disease-transmission aside, sodomy also causes physical injury, since it includes practices like "fisting", i.e., putting a fist—or two—, into the birth canal, since women lack certain anatomy men have that would substitute for a fist. *See, e.g.*, Nat'l Ctr. for Biotech. Info., U.S. Nat'l Libr. of Med., Nat'l Insts. of Health, *Vaginal "fisting" as a cause of death.*, PubMed.gov (undated)[19] (young woman dies from vaginal fisting) (citation omitted).

This all proves that sodomy is a comparative vector of injury and disease. (And because of science,

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[17] http://thechart.blogs.cnn.com/2012/08/17/fewer-teens-having-oral-sex/.

[18] http://www.gmhc.org/news-and-events/events-calendar/the-bottom-line-on-rectal-microbicide-research.

[19] http://www.ncbi.nlm.nih.gov/pubmed/2929548.

not relying on moralistic or Biblical reasons. One does not need to be religious to fear AIDS.)

Thus, while under the "negative liberty" of *Lawrence*, States cannot outlaw consensual non-commercial adult sodomy, *see id.*, States are not obliged to *endorse or subsidize* an activity, same-sex marriage, whose physical base is sodomy. While marriage is not only about sex, it is still *substantially* about sex. Traditional marriage implicitly valorizes heterosexual sex, *see, e.g.*, "[M]arriage . . . is the foundation of the family", *Maynard v. Hill*, 125 U.S. 190, 211 (1888). Thus, State-blessed same-sex marriage implicitly valorizes homosexual sex, the only type anatomically possible therein. The People have a right to withhold such valorization. (*Cf.* the U.S. 12-month restriction on gay men's blood donations. Also, incest prohibitions are partly about the "health reason" of avoiding genetically-damaged offspring. Therefore, health is legally allowable as a restrictive factor re marriage.)

There is theoretical evidence of how same-sex parents sodomy-norm children, as mentioned *supra* at 13 (Boucai praises sodomy-norming effect). There is testimonial evidence, *see, e.g.*, Rivka Edelman, Robert Oscar Lopez, & Dawn Stefanowicz, *Children of Gay Parents, Part 1 of 4, in* Jephthah's Daughters (Lopez & Edelman, eds.) (2015), p. 50, where Lopez describes how the homosexual atmosphere of his same-sex-parented home, and his lack of a father, drove him to become a homosexual prostitute, *see id.* at 53. And there is scientific evidence, *see* Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 Am. Soc. Rev. 159 (2001),

> Children raised by lesbian co-parents should and do seem to grow up more open to homoerotic relationships. . . .
> . . . [C]hildren of lesbigay parents appear to express a significant increase in homoeroticism[.]

*Id.* at 178. Stacey and Biblarz nevertheless support same-sex marriage, *see id. passim*, but they candidly note, "It is neither intellectually honest nor politically wise to base a claim for justice on grounds that may prove falsifiable empirically." *Id.* at 178. (I.e., they refuse to suppress research results proving sodomy-norming by same-sex parentage.) However, not Stacey and Biblarz, but the People, should decide whether an increased rate of homosexual behavior and sodomy among same-sex-parented children is a reason not to grant a marriage license to same-sex couples.

(*See, e.g.*, CDC, *HIV Among Youth* (undated)[20], "Most new HIV infections among youth occur among gay and bisexual males; there was a 22% increase in estimated new infections in this group from 2008 to 2010." *Id.* Respondents are not obliged to norm lifestyles leading to further infections.)

A State has compelling reason for not raising to the status of marriage a lifestyle which, unless chaste, is based in inherently risky or deadly behaviors. (By contrast: policing, for disease, heterosexuals who want to get married or stay married, would be impractical for essentially the reasons *supra* at 16-17 on policing fertility.)

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[20] http://www.cdc.gov/hiv/risk/age/youth/.

## X. MANY ARGUMENTS FOR MANDATORY LEGAL SAME-SEX MARRIAGE WOULD ALSO SUPPORT LEGALIZING POLYGAMY

And there are few arguments for same-sex marriage that could not be made for polygamy. *See, e.g.*, Patricia, *Our America with Lisa Ling – "Modern Polygamy" a New Perspective on an Old Taboo*, The Daily OWN, Oct. 24, 2011,[21] "Lisa [Ling] introduced a group of all women who were meeting with a gay activist for training. They were determined to fight for their rights and lifestyle[, and] claim to want the ability to have their children not feel like second class citizens." *Id.* So, polygamists are actually training with gay activists, *see id.*, and using "rights" or "protecting our children from animus" arguments to legalize polygamy, exactly as same-sex couples do. Sauce for geese may cover ganders too.

Some may claim that polygamy/polyamory is inherently dangerous and unequal. However, what if there were an isogamous multipair marriage ("IMM"), "iso" ("equal") plus "gamous" ("marriage"), which had an even, sex-balanced number of partners? E.g., a tetrad of two men group-marrying two women: an "intimate quadrilateral" States could set upper bounds, e.g., ten people (five pairs) would be too many. But "equality" would reign, and gender-balance. How, then, could someone who believes in the fallacious "fundamental right to non-traditional marriage" that Petitioners proffer, complain about an "IMM"? *See, e.g.*, Martha Nussbaum, *A Right to Marry? Same-sex Marriage and Constitutional Law*,

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[21] http://www.thedailyown.com/our-america-with-lisa-ling-modern-polygamy-a-new-perspective-on-an-old-taboo.

Dissent, Summer 2009[22] (not only supporting same-sex marriage but also claiming "legal restriction . would not tell against a regime of sex-equal polygamy").

*See also, e.g.*, Sheff Article, *supra* at 22, where Sheff, having researched polyamorous families for 15 years, concludes, "The kids who participated in my research were in amazingly good shape", *id.* (Though many polyamorous families were white and wealthy, many were far from wealthy, *see id.*) So if, *see id.*, some social science shows polyamory is not harmful to children: then, logically, polyamorists' "fundamental right to marry" should not be impeded, lest their children be "harmed and humiliated".

Some question why children conceived or adopted by same-sex couples should not profit from their parents becoming married. However, this applies equally to polygamists' children. (Also, marriage is given as an ideal, whereas adoption is largely to help children without biological parents. So, a State-licensed ideal of same-sex marriage has motherlessness, fatherlessness, and sodomy-norming problems.)

Also, if some say that the Court has previously shown more respect for same-sex privacy and relationships than for polygamy: if there is a super-fundamental right to marriage, the right to marry *whom you will* would cover anybody, regardless of number. And *Lawrence* "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."

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[22] http://www.dissentmagazine.org/article/a-right-to-marry-same-sex-marriage-and-constitutional-law.

*Id.* at 578 (Kennedy, J.). When *Lawrence* says, "[Re] personal decisions relating to marriage, procreation [,] family relationships, [and] child rearing[, gays] may seek autonomy for these purposes", *id.* at 574, that logically refers to free-speech actions like voting and lobbying for same-sex marriage, in line with *One, Inc. v. Olesen*, 355 U.S. 371 (1958) (upholding gays' free-speech rights). If *Lawrence* at 574 (gays may seek autonomy) contradicts *Lawrence* at 578 (same-sex marriage not endorsed), then *Lawrence* is self-contradicting.

And re any argument that same-sex-marriage bans prevent homosexuals from marrying anyone at all: this does not address homosexuals' ability to move to another State, just as enamored first cousins may have to do likewise. And people who want polygamous—or, e.g., incestuous—relationships, may want no other partner(s) but their chosen, and feel their lives are ruined by denial of marriage.

And, some assert that a homosexual soldier who risks his life for America should *ipso facto* have the right to same-sex marriage. However, *see Potter v. Murray City*, 585 F. Supp. 1126 (1984), 760 F.2d 1065 (1985), *cert. denied*, 474 U.S. 849 (1985), re polygamist Utah policeman Royston Potter. He lost his employment case, i.e., Murray City fired him for his polygamy; but the parties stipulated that Potter had treated his wives and children quite well, *see* 585 F. Supp. at 1129. As a policeman, Potter risked his life for the community, just like a soldier. But he was still not given a right to the type of marriage he wanted, *see id.* at 1142-43. And this Court let that stand, 474 U.S. 849.

So even when sexual minorities can show they raise families as well as traditional families, *see* 585 F. Supp. at 1129, it is still constitutional to treat them differently. (Indisputably, licensing polygamists' marriage would lessen stigma for them and their children; yet, the long-term effect of licensing would be to create more polygamy, which is not desirable.)

Finally, *see* Hilary White, *Group marriage is next, admits Dutch 'father' of gay 'marriage'*, LifeSiteNews, Mar. 12, 2013, 5:58 p.m.:[23] "Boris Dittrich, the homosexual activist called the 'father' of Dutch gay 'marriage', has admitted that group marriages of three or more people, is the next, inevitable logical step[.]" *Id.* The Court should avoid the slippery slope presented.

## XI. SOCIAL SCIENCE ON SAME-SEX MARRIAGE IS STILL UNSETTLED, THOUGH SOME SUPPORTS RESPONDENTS

The *DeBoer* trial court highly praised research purporting to show no difference between same-sex and diverse-sex parenting; and that court practically savaged research which asserted otherwise. *See* 973 F. Supp. 2d 757, 761-68 (E.D. Mich. 2014). However, there are various authorities, such as Walter Schumm and Paul Sullins, whose research supports Respondents, and whose work the trial court did not consider. Thus, social science is not conclusive one way or the other.

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[23] http://www.lifesitenews.com/news/group-marriage-is-next-admits-dutch-father-of-gay-marriage.

A striking example of this inconclusiveness relates to Mircea Trandafir, who authored an award-winning 2009 study, *The effect of same-sex marriage laws on different-sex marriage: Evidence from the Netherlands.*[24] It says, "I [Trandafir] find that the marriage rate rose after the registered partnership law but fell after the same-sex marriage law." *Id.* at title/Abstract page.

Also:

> One relatively straightforward way to gauge the decline in the marriage rate is to compare the largest gap between the actual marriage rate in the Netherlands and the synthetic control . . . This [evidence] suggests that the decline in the marriage rate after 2001 is rather significant[.]

*Id.* at 24. Trandafir offers as a plausible explanation for the decline, "the end-of-marriage argument: the same-sex marriage law changes the value of marriage for some couples, who choose not to marry anymore." *Id.*

Finally, some especially significant statistics:

> The marriage rate of men over the 1995—2005 period is, on average, 2.99 percent and is estimated to fall by 0.16 percentage points after the same-sex marriage law, compared to a long-term downward trend of 0.05 percentage points per year. In the case

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[24] *Available at* http://www.iza.org/conference_files/TAM2010/trandafir_m6039.pdf (courtesy of Institute for the Study of Labor).

> of women, the average marriage rate is 4.07 percent and the decline is 0.65 percentage points[,] while the downward trend is 0.05 percentage points per year.

*Id.* at 16-17. 0.65 percentage-points decline compared to 4.07 percentage points, *id.* at 17, is a steep, significant drop in the female marriage rate, almost one-sixth.

The bizarre part of the story is that Trandafir then "updated" the study, but to say nearly the exact opposite thing, *see* the version at 51 Demography 317 (2014).[25] The 2014 study claims "an insignificant decrease [in either different-sex marriages or marriages in general] after the same-sex marriage law", *id.* at 3. So, while acknowledging damage to traditional marriage, *see id.*, Trandafir calls it "insignificant"— directly contradicting his 2009 study calling the damage "significant", *id.* at 24. The 2014 study, *see id.*, completely and unexplainedly omits, *inter alia*, the 2009 version's statistic re the huge 0.65 percentage-point decline from the 4.07 percentage-point female marriage rate, *id.* at 17. In fact, the 2014 version does not even *mention* the 2009 version, or the reasons for the total turnaround re "significant damage" These gross material omissions are incomprehensible, and make the 2014 report more of a near-polar opposite to the 2009 report, not an "update"

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[25] *Available at* http://findresearcher.sdu.dk:8080/portal/files/80662951/MS_2012_063.pdf (courtesy of Syddansk Universitet).

Amicus accuses no one of bad faith, but the very strange contradiction between the two versions of Trandafir's report almost reminds Amicus of what Boucai said, *supra* at 13, about gay-marriage advocates' omitting or distorting the record re bisexuality. Mandatory-same-sex-marriage proponents have not told the full story, in social science or otherwise; and Amicus hopes this Court takes account of crucial information like, "The results suggest that same-sex marriage leads to a fall in the different-sex marriage rate," Trandafir 2009 Rep. at title/Abstract page.

## XII. RATIONAL BASIS IS THE RIGHT LEVEL OF SCRUTINY; AND THE REASONS ADDUCED HERE COMPRISE VERY COMPELLING STATE INTERESTS

But even if heightened scrutiny were somehow necessary instead of rational basis, the various bases adduced *supra*, either singly or together, form very compelling government interests.

Even strict scrutiny is met. E.g., the interest in gender diversity of parents seems far more compelling than racial/gender diversity at colleges, and is met in a narrowly-tailored manner. People aren't arrested for *not* entering opposite-sex marriages, or harassed by State billboards or mandatory "get married" classes; rather, people are just not actively supported by government for entering same-sex marriage.

The reasonably-least-restrictive means are used as well. For example, re diverse-gender role models, would it really be less restrictive to have the Government provide two male spouses a visiting

female breast-feeder and role model for children? or give two female wives a "rent-a-man" as a male role model for children?

Similarly, with the disease- and injury-risking practice of nonreproductive sex—and reduction of AIDS and cancer is a compelling interest—, *Lawrence* prohibits punishing sodomy. But it need not be encouraged, either: i.e., no State "merit badge" or financial benefit need be given to same-sex marriage. (People are legally free to engage in private sodomy all they want, or marry at any church or synagogue which marries gays.)

## XIII. SEEKING PRINCIPLED "MIDDLE GROUND", IF NEEDED, IN THESE CASES

While Respondents deserve total victory, the Court may somehow prefer to seek a middle path. One inappropriate "middle path" would be to force States to recognize same-sex marriages from other States, while preserving for each State the right not to license same-sex marriages itself. This "compromise" would be fallacious, in that this age of cheap, easy travel, and perhaps one day same-sex marriages recognized over the Internet, would make a State's own "public policy" meaningless, if the State must recognize alien same-sex-marriage licenses.

(Those same-sex couples moving to a State without same-sex marriage are at least "assuming the risk" by choice; as opposed to their children, who are choiceless about lack of father or mother.)

What may be a more reasonable "middle ground" would be to recognize the status quo: that is, any

same-sex marriages that have already taken place, could be recognized, and those couples could serve as an "experimental body" to see how they and their children do. However, bans on future same-sex marriages would stand.

Also, for example, bans on civil unions might be overturned, so that there would be mandatory legality of civil unions, or "domestic partnerships" or a "reciprocal benefits contract", that would offer same-sex couples some legal protection.

Amicus is definitely not recommending the Court impose such an arrangement on any State; he is merely saying that such an arrangement would be less damaging than mandatory national same-sex marriage.

Too, a "middle ground" already exists in that the federal government currently offers federal tax breaks to same-sex couples who marry in any State. This resembles the offering of federal healthcare subsidies on HHS-run exchanges (which Amicus supports) even if a State did not establish an exchange. So, same-sex couples are already receiving massive relief and protection (especially given that federal taxes are often higher than State taxes), and a "middle ground" thus exists between States' choices on same-sex marriage, and federal activism in providing tax benefits to same-sex couples.

And if, *arguendo*, every recent State ban on same-sex marriage is somehow "fatally infected with animus [or other bad element]": the Court could strike down those bans, but not strike down the States' underlying laws, of centuries' provenance,

upholding traditional marriage. As well, if a State ban has "bad element A" (animus) mixed with "more worthy elements B and C" (re fertility, or the good of complementary-gender parenting, etc.), the Court could delineate what elements are good or bad, so that a struck-down referendum or law could be reenacted—but now sans any forbidden element—by the People.

* * *

What is the "American People"? A diverse and diversely-scattered crew, among other things: straights, gays, polys, etc. To let them self-define on a public level, by defining—through majority vote—the public honors, subsidies, and licenses in their region, their State, seems fair. If the Court does not allow this, in a matter as fundamental as defining marriage, then the experiment in democracy known as America has truly failed.

The Court's own vote here may have a tincture of unavoidable tragedy, in that each side, Petitioners or Respondents, may be disappointed and damaged, even on a constitutionally-injurious level, if it loses. But America's story allows one to escape tragedy, to have a second act. Same-sex couples, if they desire marriage, are mobile citizens who can "escape" to a State that offers marriage. But their children, if any, have no, or very little, recourse, scant escape, from their motherlessness or fatherlessness. There is no second act for them. States should be allowed to maintain a "safe zone", wherein the stigma and humiliation of motherlessness/fatherlessness is not lauded and abetted by the State, and a same-sex couple's parentage and marriage are not given license.

If the People of every State someday do not want children to have that safe zone any more, so will it be. But if traditional marriage is reaching its sunset, then the Court should let it sunset only if the People want that. *Grutter* allowed 25 years, *see* 539 U.S. at 343, to sunset affirmative action, a fairly recent practice which uses explicit racial preferences. For the Court not to allow at least that quarter-century space, then, to allow traditional marriage, a tradition of millennia, to sunset out, would be absurd, and unjust. The People can work out same-sex-marriage issues themselves.

Otherwise put: if solely-traditional marriage must perish from this Nation, at least let it not be because "government of the people, by the people, for the people"[26] perishes here, perishes because the Court does not trust the People enough. Generations have died for the democratic ideal; keeping faith with them, with both our fathers and mothers who died for that ideal, would be the path of greatest honor. Future generations, well aware that the Fourteenth Amendment is not violated by letting children follow the Fifth Commandment, having, cherishing, and honoring father and mother, may be deeply grateful that this Court follows that honorable path.

## CONCLUSION

Amicus respectfully asks the Court to uphold the judgments of the court of appeals; and humbly thanks the Court for its time and consideration.

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[26] President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).

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